

### Remarks

This is in response to the non-final Office Action mailed on August 27, 2004. The specification is amended to update references to two related applications. Claims 1-27 remain pending. Reconsideration and allowance of all claims are respectfully requested in view of the following remarks.

In the Office Action at paragraph 6, claims 1-27 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Goodwin et al. (US 6,158,049) in view of Levine et al. (US 6,349,406) and further in view of Roediger et al. (US 5,960,198). This rejection is respectfully traversed, and reconsideration is requested for at least the following reasons.

Claim 1 recites, among other limitations, a performance code marker module for obtaining and storing the run-time internal state data for later retrieval at predefined points corresponding to permanently inserted performance markers.

As noted in previous responses, permanently inserted performance markers are intended to be in the final version of an application program that is ultimately delivered to end users. The permanently inserted performance markers impose little, if any, overhead to operate and thus are not removed from the application program when testing of the application is completed. In addition, permanently inserted performance markers allow performance testing on a version of the application program that is identical to the version that is ultimately considered the delivered product, thereby enhancing the reliability of such testing.

The rejection concedes that Goodwin fails to disclose permanently inserted performance markers, as recited by claim 1. Office Action, p. 5, ll. 12 and 13. Levine likewise fails to disclose or suggest permanently inserted performance markers.

The rejection cites column 8, lines 15-37 of Roediger as disclosing insertion of instrumentation into code along with a profiling bit that can be enabled or disabled, allowing the instrumentation to be present in the code even when profiling is not desired. The rejection further states that it would have been obvious to include permanently inserted performance markers as per the teachings of Roediger. Office Action, p. 5, ll. 13-18. This characterization of Roediger is respectfully traversed.

It is respectfully suggested that Roediger fails to disclose or suggest permanently inserted performance markers. Roediger states: "Instrumented computer program 28 will be executed on a set of inputs believed to represent a typical runtime environment." Roediger, col. 8, ll. 30-32.

Therefore, Roediger only discloses instrumented code that is used in a simulated environment with a set of inputs "believed to represent a typical runtime environment." See also Roediger, col. 6, ll. 43-47 (noting that the instrumented code is executed using simulated inputs). Roediger consequently fails to disclose or suggest that the instrumented program includes permanently inserted performance markers, as recited by claim 1.

Reconsideration and allowance of claim 1, as well as claims 2-12 that depend therefrom, are respectfully requested for at least these reasons.

Claims 13 and 18 both recite permanently inserting one or more code markers into an application program at locations within the application program corresponding to a point at which run-time internal state data is desired. Therefore, claims 13 and 18, as well as claims 14-17 and 19-27 that depend respectively therefrom, should be allowable for at least reasons similar to those provided above with respect to claim 1. Reconsideration and allowance are respectfully requested.

The remarks set forth above provide certain arguments in support of the patentability of the pending claims. There may be other reasons that the pending claims are patentably distinct over the cited references, and the right to raise any such other reasons or arguments in the future is expressly reserved.

For all of the above reasons, the pending claims are patentable over the prior art of record. Favorable reconsideration in the form of a Notice of Allowance is requested. Please contact the undersigned attorney with any questions regarding this application.

Respectfully submitted,  
MERCHANT & GOULD P.C.  
P.O. Box 2903  
Minneapolis, Minnesota 55402-0903  
(612) 332-5300

Date: November 9, 2004



Robert A. Kalinsky  
Reg. No. 50,471  
RAK